No. 14718

In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT IN ANSWER TO THAT OF AMICUS CURIAE

KRAMER, ROCHE & PERRY
Central & Washington Bldg.
Phoenix, Arizona
Attorneys for Appellant

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PREFACE

As it appears to appellant, upon reading the brief of amicus curiae, such friend of the court desires several questions determined upon this appeal.

If agreeable to the court and to appellee, appellant would join in the request that such matters be so determined.

In fact, either correctly or incorrectly, appellant had understood this to be a "test case" to determine whether or not appellant had the right, without contrary directive of the Secretary of the Interior, to operate his pump and well for the purpose of irrigating his farm.

If that question can properly be determined here it will, as suggested by amicus curiae, settle the controversy as to whether the right of a landowner to pump underground water for irrigation from below his own land, is permissible in the absence of a prohibition by the Secretary of the Interior.

Prefatory to argument, it may be observed that plaintiff's "Exhibit B" (Tr. 51 et seq.), the so-called "repayment contract", was considered as in evidence by stipulation of the parties (Tr. 125).

It was not referred to in the opening brief of the appellant for the reason that, if correctly understood by appellant, the record is devoid of any suggestion appellant, or any of his predecessors in interest, was a party thereto. However, if the other parties in interest and the amicus curiae desire it be discussed herein, appellant is willing.

Of course, many questions might have been raised upon this appeal in accordance with the "statement of points" filed by appellant (Tr. 133 et seq.), determination of which would not have settled the points now suggested by amicus curiae. Many of these were waived or abandoned by appellant in the hope of a determination of the real meaning of the "Landowners' Agreement", "Exhibit A", (Tr. 20 et seq.).

Appellant has nothing to add to the first two sections of the argument contained in his opening brief, but will endeavor to discuss the other points as suggested by amicus curiae.

SUMMARY OF ARGUMENT

1. The "Repayment Contract", "Exhibit B", (Tr. 51) is definitely a written memorandum of the agreement arrived at between appellee and amicus curiae.

2. The remedy of the appellee and amicus curiae, if there has been a violation of the Gila River Decree, is by motion to enforce such decree and not by an independent suit for injunction.

ARGUMENT

1. The "Repayment Contract", "Exhibit B", (Tr. 51) is definitely a written memorandum of the agreement arrived at between appellee and amicus curiae.

Amicus curiae in support of its argument on behalf of the appellee relies heavily upon the "Repayment Contract" entered into between it and the United States under date of June 8, 1931 ("Exhibit B", Tr. 51) and states in effect that the present friend of the court was the agent of appellant in the execution of such contract, but it is to be noted that such "Repayment Contract" (Tr. 78, 79) confirms and adopts the "Landowners' Agreement" ("Exhibit A", Tr. 20) by which the rights of the parties to this appeal are to be determined.

Therefore, appellant most respectfully insists that if the argument contained at pages 5 to 12 of his opening brief herein is correct, then the judgment in this case should be reversed.

Can it be successfully contended that the United States of America and San Carlos Irrigation & Drainage District can effectively enter into a contract abrogating the rights of Paul Brophy under the "Landowners' Agreement"?

To appellant, it appears that the so-called "Repayment Contract" can in no case change or modify the rights of the active parties to this litigation as set forth in the "Landowners' Agreement". This was the position of appellant in the court below and he has not departed therefrom.

2. The remedy of the appellee and amicus curiae, if there has been a violation of the Gila River Decree, is by motion to enforce such decree and not by an independent suit for injunction.

Contrary to the decision of the Supreme Court of Arizona in *Taylor v. Tempe Irrigating Canal Company,* 21 Ariz. 574, 193 P. 12, cited upon page 14 of the opening brief of the appellant herein, amicus curiae asserts the United States, by an independent action for injunction, may enforce the terms of the Gila River Decree heretofore entered by the United States District Court for the District of Arizona and relies somewhat upon *Wyoming v. Colorado,* 298 U. S. 573, 56 S. Ct. 912, 80 L. Ed. 1339.

Counsel for appellant have examined the report of the *Wyoming v. Colorado* decision in accordance with the citation and also the prior decision upon motion to dismiss, 286 U. S. 494, 52 S. Ct. 621, 76 L. Ed. 1245.

It does not appear the objection here presented was raised or determined there.

Sain v. Montana Power Comanpy, 84 F. 2d 126, decided by the Court of Appeals for the Ninth Circuit in 1936, and quoted upon page 34 of the brief of the amicus curiae, might be authority for the contention by such friend of the court, were it not for the difference between the Montana statutes and decisions and those of Arizona. To appellant it appears the following language employed by Chief Judge Denman in the *Sain* decision points up the difference between the Montana rule and that applicable to Arizona as shown by the *Taylor* case:

> "The fact that a permanent injunction was rendered is said to indicate that cause 1953 is still pending in the Montana state court, and that therefore the federal court should leave the parties to obtain adjudication and relief in such pending cause. To the contrary, it has been held by the Supreme Court of Montana that a proceeding in contempt for violation of an injunction is distinct from the cause of action in which the injunction was rendered. (Citing cases)
>
> "The Montana cases recognize that, in disputes over water rights between parties whose rights on the stream in question have been previously adjudicated and settled by permanent injunction, it is competent for injured parties to bring actions distinct from the cause in which the injunction was issued. (Citing cases). Where a particular remedy afforded in a state proceeding is not held by the state court to exclude an independent action seek-

ing a remedy for the same wrong, the federal courts may entertain such an independent action, provided requisites of federal jurisdiction are present. (Citing cases)''

CONCLUSION

Appellant most respectfully reiterates that the language employed in the ''Landowners' Agreement'' permits of no other construction than that which appellant has placed upon it; neither the ''Repayment Contract'' nor the Gila River Decree in any way modify the language wherein appellant ''agrees not to drill or operate wells . . . for irrigation . . . contrary to any rules, orders or regulations promulgated by the Secretary of the Interior'', and there has been no rule, order or regulation of the Secretary of the Interior prohibiting or restricting the use of the pump and well here referred to.

It is believed, therefore, the judgment here upon appeal should be reversed with appropriate directions.

Respectfully submitted,

KRAMER, ROCHE & PERRY
Central & Washington Building
Phoenix, Arizona
Attorneys for Appellant
By ALLAN K. PERRY